

SECOND REGULAR SESSION  
[ P E R F E C T E D ]  
SENATE SUBSTITUTE FOR  
SENATE COMMITTEE SUBSTITUTE FOR  
**SENATE BILL NO. 763**  
**90TH GENERAL ASSEMBLY**

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INTRODUCED BY SENATOR HOWARD.

Offered February 24, 2000.

Senate Substitute adopted, March 14, 2000.

Taken up for Perfection March 14, 2000. Bill declared Perfected and Ordered Printed, as amended.

TERRY L. SPIELER, Secretary.

3153S.06P

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**AN ACT**

To repeal section 407.020, RSMo Supp. 1999, relating to telecommunications merchandising practices, and to enact in lieu thereof fifteen new sections relating to the same subject, with penalty provisions and an effective date for certain sections.

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*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Section 407.020, RSMo Supp. 1999, is repealed and fifteen new sections enacted in lieu thereof, to be known as sections 407.020, 407.1070, 407.1073, 407.1076, 407.1079, 407.1082, 407.1085, 407.1095, 407.1098, 407.1101, 407.1104, 407.1107, 407.1110, 407.1113 and 1, to read as follows:

407.020. 1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri of the fact that the attorney general has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this

subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

2. Nothing contained in this section shall apply to:

(1) The owner or publisher of any newspaper, magazine, publication or printed matter wherein such advertisement appears, or the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser; or

(2) Any institution or company that is under the direction and supervision of the director of the department of insurance, **director of the division of credit unions**, or director of the division of finance, unless the directors of such divisions specifically authorize the attorney general to implement the powers of this chapter or such powers are provided to either the attorney general or a private citizen by statute.

3. Any person who willfully and knowingly engages in any act, use, employment or practice declared to be unlawful by this section with the intent to defraud shall be guilty of a class D felony.

4. It shall be the duty of each prosecuting attorney and circuit attorney in their respective jurisdictions to commence any criminal actions under this section, and the attorney general shall have concurrent original jurisdiction to commence such criminal actions throughout the state where such violations have occurred.

5. It shall be an unlawful practice for any long-term care facility, as defined in section 660.600, RSMo, except a facility which is a residential care facility I or a residential care facility II, as defined in section 198.006, RSMo, which makes, either orally or in writing representation to residents, prospective residents, their families or representatives, regarding the quality of care provided, or systems or methods utilized for assurance or maintenance of standards of care, to refuse to provide copies of documents which reflect the facility's evaluation of the quality of care, except that the facility may remove information that would allow identification of any resident. If the facility is requested to provide any copies, a reasonable amount, as established by departmental rule, may be charged.

6. Any long-term care facility, as defined in section 660.600, RSMo, which commits an unlawful practice under this section shall be liable for damages in a civil action of up to one thousand dollars for each violation, and attorney's fees and costs incurred by a prevailing plaintiff, as allowed by the circuit court.

**407.1070. As used in sections 407.1070 to 407.1085, the following terms shall mean:**

**(1) "Advertisement", as defined in section 407.010;**

**(2) "Caller identification service", a type of telephone service which permits telephone subscribers to see the telephone number of incoming telephone calls;**

**(3) "Consumer", a natural person who purchases, may purchase or is solicited for purchase of merchandise or an investment opportunity by a telemarketer through**

**telemarketing;**

**(4) "Established business relationship", a prior or existing relationship formed by a voluntary two-way communication between a seller or telemarketer and a consumer with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the consumer regarding products or services offered by such seller or telemarketer, which relationship has not been previously terminated by either party;**

**(5) "Fictitious name", any name, other than the legal name, used by a seller or telemarketer;**

**(6) "Investment opportunity", anything tangible or intangible that is offered for sale, sold or traded based wholly or in part on representations, either express or implied, about past, present or future income, profit or appreciation;**

**(7) "Material aspect or element", any factor likely to significantly influence the consumer's choice of, or conduct regarding, merchandise;**

**(8) "Merchandise", any objects, wares, goods, commodities, intangibles, real estate or services;**

**(9) "Prize", anything offered or purportedly offered or given or purportedly given to a consumer by chance. For purposes of this definition, chance exists if a consumer is guaranteed to receive anything of value and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the consumer will receive;**

**(10) "Promptly", immediately at the beginning of any call initiated by a telemarketer to a consumer;**

**(11) "Seller", any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide merchandise to the consumer in exchange for consideration;**

**(12) "Telemarketing", a plan, program or campaign which is conducted to induce the purchase or lease of merchandise by use of one or more telephones and which involves more than one telephone call;**

**(13) "Telemarketer", any person, or any recorded, computer-generated, electronically-generated or other voice communication of any kind, who, in connection with telemarketing, initiates or receives telephone calls to or from a consumer. A telemarketer includes, but is not limited to, any such person that is an owner, operator, officer, director or partner to the management activities of a business.**

**407.1073. 1. A telemarketer shall disclose, promptly and in a clear and conspicuous manner, to the consumer receiving the telephone call the following:**

**(1) That the purpose of the telephone call is to make a sale;**

**(2) The telemarketer's identifiable name and the seller on whose behalf the**

**solicitation is being made;**

**(3) The nature of the merchandise or investment opportunity being sold;**

**(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered. This disclosure shall be made before or in conjunction with the description of the prize to the consumer called; and**

**(5) If the telephone call is made by any recorded, computer-generated, electronically-generated or other voice communication of any kind, when engaged in telemarketing, such voice communication shall, promptly at the beginning of the telephone call, inform the consumer that the call is being made by a recorded, computer-generated, electronically-generated or other type of voice communication, as the case may be, and that if such consumer wishes to discontinue such call, such consumer should hang up immediately.**

**2. Before a consumer pays for merchandise offered for sale through telemarketing, the telemarketer shall disclose, in a clear and conspicuous manner, the following:**

**(1) The seller or telemarketer's identifiable name and the address or telephone number where the seller or telemarketer can be reached;**

**(2) The total cost and quantity of the merchandise that is the subject of the telemarketing sales call;**

**(3) Any material restriction, limitation or condition to purchase, receive or use the merchandise that is the subject of a telemarketing sales call;**

**(4) Any material aspect of the nature or terms of the refund, cancellation, exchange or repurchase policies, including the absence of such policies;**

**(5) Any material aspect of an investment opportunity being offered, including benefits, the price of the land or other investment, and the location of the investment;**

**(6) Material elements of a prize promotion, including:**

**(a) The odds of being able to receive the prize and, if the odds are not calculable in advance, the factors and methods used in calculating the odds;**

**(b) That no purchase or payment of any kind is required to win a prize or to participate in a prize promotion;**

**(c) The no-purchase or no-payment method of participating in the prize promotion, with either instructions on how to participate or an address or local or toll-free telephone number to which consumers may write or call for information on how to participate; and**

**(d) All material conditions to receive or redeem the prize.**

**3. A telemarketer shall not misrepresent, directly or by implication, any of the**

**following:**

- (1) A description of the prize;**
- (2) Its market value;**
- (3) The actual number of each prize to be awarded;**
- (4) The date by which the prize will be awarded.**

**4. A telemarketer shall not misrepresent any material aspect of the performance, quality, efficacy, nature or basic characteristics of merchandise that is the subject of a telemarketing sales call.**

**407.1076. It is an unlawful telemarketing act or practice for any seller or telemarketer to engage in the following conduct:**

- (1) Omit or misrepresent any material fact required pursuant to section 407.1073;**
- (2) Threaten, intimidate or use profane or obscene language;**
- (3) Cause the telephone to ring or engage any consumer in telephone conversation, repeatedly or continuously in a manner a reasonable consumer would deem to be annoying, abusive or harassing;**

- (4) Knowingly and willfully initiate a telemarketing call to a consumer, or transfer or make available to others for telemarketing purposes a consumer's telephone number when that consumer has stated previously that he or she does not wish to receive solicitation calls by or on behalf of the seller unless such request has been rescinded;**

- (5) Engage in telemarketing to a consumer's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time, at the called consumer's location;**

- (6) Request or receive payment in advance to remove derogatory information from or improve a consumer's credit history, credit record or credit rating;**

- (7) Request or receive payment in advance from a consumer, to recover or otherwise aid in the return of money or any other item lost by the consumer in a prior telemarketing transaction, except that this provision shall not apply to services provided by a licensed attorney;**

- (8) Obtain or submit for payment a check, draft or other form of negotiable paper drawn on a consumer's checking, savings, share or similar account without the consumer's express written or oral authorization. Such authorization shall be deemed verifiable if any of the following means are employed:**

- (a) Express written authorization by the consumer, which may include the consumer's signature on the negotiable instrument;**

- (b) Express oral authorization which is tape recorded and made available upon request to the consumer's bank and which evidences clearly both the consumer's authorization of payment for the merchandise that is the subject of the sales offer and**

**the consumer's receipt of all of the following information:**

- a. The date of the draft or drafts;**
- b. The amount of the draft or drafts;**
- c. The payor's name;**
- d. The number of draft payments;**
- e. A telephone number for consumer inquiry that is answered during normal**

**business hours; and**

- f. The date of the consumer's oral authorization; or**

**(c) Written confirmation of the transaction, sent to the consumer prior to submission for payment of the consumer's check, draft or other form of negotiable paper, which shall include:**

- a. All of the information contained in paragraph (b) of this subdivision; and**
- b. The procedures by which the consumer can obtain a refund from the seller or telemarketer in the event that the confirmation is inaccurate;**

**(9) Procure the services of any professional delivery, courier or other pick-up service to obtain immediate receipt or possession of a consumer's payment, unless the merchandise or investment opportunity is delivered with the opportunity to inspect before any payment is collected;**

**(10) Knowingly assist or support any telemarketer when the seller knew or should have known that the telemarketer was engaged in any act in violation of sections 407.1070 to 407.1085; or**

**(11) Knowingly utilize any method to block or otherwise circumvent a consumer's use of a caller identification service.**

**407.1079. 1. A seller or telemarketer shall keep for a period of twenty-four months from the date the record is produced, all verifiable authorizations and records as required in sections 407.1070 to 407.1085, in the form, manner, format or place as they keep such records in the ordinary course of business, including but not limited to:**

**(1) All substantially different advertising, brochures, telemarketing scripts and promotional materials;**

**(2) For any prize with a value of twenty-five dollars or greater, the name and last known address of each prize recipient and the prize awarded;**

**(3) The name and last known address of each consumer, the merchandise purchased, the date such merchandise was shipped or provided and the amount paid by the consumer for the merchandise;**

**(4) The name, any fictitious name used, the last known home address and telephone number, and the job title for all current and former employees directly involved in telephone sales, provided, that if the seller permits fictitious names to be**

used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All written authorizations required to be provided or received pursuant to sections 407.1070 to 407.1085.

2. In the event of any dissolution or termination of the telemarketer's business, the telemarketer shall maintain all records as required pursuant to this section. In the event of any sale, assignment or other change in ownership of the seller's business, the successor shall maintain all records required pursuant to this section.

407.1082. 1. It is unlawful to violate any provision of sections 407.1070 to 407.1085 or to misrepresent or omit the required disclosures of section 407.1073 or 407.1076, and pursuant to sections 407.010 to 407.130, the violator shall be subject to all penalties, remedies and procedures provided in sections 407.010 to 407.130. The remedies available in this section are cumulative and in addition to any other remedies available by law.

2. Any person who willfully and knowingly engages in any act or practice declared to be unlawful by any provision of subdivisions (2) to (5) of section 407.1076 shall be guilty of a class A misdemeanor. Any person who willfully and knowingly engages in any act or practice declared to be unlawful by any provision of subdivision (1) of section 407.1076, or of subdivisions (6) to (11) of section 407.1076, shall be guilty of a class D felony. Any person previously convicted of a class D felony pursuant to this subsection shall, for each subsequent conviction, be guilty of a class D felony punishable by the term of years set out for a class D felony, but with a fine of not more than five thousand dollars or a fine equal to triple the gain, with no limit on the amount recoverable pursuant to any triple the gain penalty. Any person who willfully and knowingly fails to keep the records required in section 407.1079 shall be guilty of a class A misdemeanor.

3. In addition to the remedies already provided in sections 407.1070 to 407.1085, any consumer that suffers a loss or harm as a result of any unlawful telemarketing act or practice pursuant to section 407.1076 may recover actual and punitive damages, reasonable attorney's fees, court costs and any other remedies provided by law.

4. Any consumer that suffers a loss or harm as a result of any unlawful telemarketing act, or practice pursuant to section 407.1076 may pursue any remedy available pursuant to the Federal Telephone Consumer Protection Act of 1992, as amended.

407.1085. 1. The provisions of sections 407.1070 to 407.1082 shall not apply to:

(1) Telephone calls in which the sale of merchandise is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the telemarketer or seller; or

**(2) Telephone calls initiated by a consumer that:**

**(a) Are not the result of any advertisement by a seller or telemarketer;**

**(b) Are in response to an advertisement through any media, other than direct mail or telemarketing, which discloses the name of the seller and the identity of the merchandise; provided that, this exemption shall not apply to calls initiated by the consumer in response to an advertisement that offers a prize or investment opportunity, or is used to engage in telemarketing activities prohibited by subdivision (7), (8) or (9) of section 407.1076; or**

**(c) Are in response to direct mail solicitations that clearly and conspicuously disclose and do not misrepresent the material information required by subsection 2 of section 407.1073; provided that, this exemption does not apply to calls initiated by the consumer in response to an advertisement that offers a prize or investment opportunity, or is to engage in telemarketing activities prohibited by subdivision (7), (8) or (9) of section 407.1076; or**

**(d) Are in response to the mailing of a catalog which contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller, includes multiple pages of written materials or illustrations; and has been issued not less frequently than once a year, when the seller or telemarketer does not contact consumers by telephone but only receives calls initiated by consumers in response to the catalog, and stops further solicitation of items not in a catalog when the consumer states that he or she is not interested in any further solicitations; or**

**(3) Telephone calls or messages:**

**(a) To any consumer with such consumer's prior express invitation or permission;**

**(b) To any consumer with whom the seller has an established business relationship; or**

**(c) By or on behalf of any entity over which either a state or federal agency has regulatory authority if:**

**a. Subject to such authority, the entity is required to maintain a license, certificate or permit to sell or provide the merchandise being offered through telemarketing; and**

**b. The state or federal agency has promulgated rules that regulate the telemarketing sales practices of the entity for any and all merchandise that entity offers through telemarketing and are reasonably consistent with the requirements of section 407.1070 through section 407.1079 which allow consumer redress pursuant to that agency's rules or applicable federal law.**

**2. The office of the attorney general shall receive telemarketing complaints by**

means of a toll-free telephone number, by a notice in writing or by electronic means. Complaints against entities who are licensed, certificated or permitted and whose telemarketing practices are regulated by the same state or federal agency and which agency has rules regulating telemarketing practices shall be forwarded for investigation by the office of the attorney general to such agency. All other complaints shall be handled by the office of the attorney general.

**407.1095.** As used in sections 407.1095 to 407.1107, the following words and phrases mean:

(1) "Caller identification service", a type of telephone service which permits telephone subscribers to see the telephone number of incoming telephone calls;

(2) "Residential subscriber", a person who has subscribed to residential telephone service from a local exchange company or the other persons living or residing with such person;

(3) "Telephone solicitation", any voice communication over a telephone line from a live operator, through the use of ADAD equipment or by other means for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, but does not include communications:

(a) To any residential subscriber with that subscriber's prior express invitation or permission;

(b) By or on behalf of any person or entity with whom a residential subscriber has had a business contact within the past sixty days or a current business or personal relationship;

(c) By or on behalf of a tax-exempt nonprofit organization; or

(d) By or on behalf of any entity over which a federal agency has regulatory authority if:

a. Subject to such authority, the entity is required to maintain a license, permit or certificate to sell or provide the merchandise being offered through telemarketing; and

b. The entity is required by law or rule to develop and maintain a no call list.

**407.1098.** No person or entity shall make or cause to be made any telephone solicitation to the telephone line of any residential subscriber in this state who has given notice to the attorney general, in accordance with rules promulgated pursuant to section 407.1101 of such subscriber's objection to receiving telephone solicitations.

**407.1101. 1.** The attorney general shall establish and provide for the operation of a database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations. The attorney general shall have such database in operation no later than February 1, 2001.

**2. No later than January 1, 2001, the attorney general shall promulgate rules and regulations governing the establishment of a state no-call database as he or she deems necessary and appropriate to fully implement the provisions of sections 407.1095 to 407.1110. The rules and regulations shall include those which:**

**(1) Specify the methods by which each residential subscriber may give notice to the attorney general or its contractor of his or her objection to receiving such solicitations or revocation of such notice. There shall be no cost to the subscriber for joining the database.**

**(2) Specify the length of time for which a notice of objection shall be effective and the effect of a change of telephone number on such notice;**

**(3) Specify the methods by which such objections and revocations shall be collected and added to the database;**

**(4) Specify the methods by which any person or entity desiring to make telephone solicitations will obtain access to the database as required to avoid calling the telephone numbers of residential subscribers included in the database, including the cost assessed to that person or entity for access to the database;**

**(5) Specify such other matters relating to the database that the attorney general deems desirable.**

**3. If the Federal Communications Commission establishes a single national database of telephone numbers of subscribers who object to receiving telephone solicitations pursuant to 47 U.S.C., Section 227(c)(3), the attorney general shall include that part of such single national database that relates to Missouri in the database established pursuant to this section.**

**4. Information contained in the database established pursuant to this section shall be used only for the purpose of compliance with section 407.1098 and this section or in a proceeding or action pursuant to section 407.1110. Such information shall not be considered a public record pursuant to chapter 610, RSMo.**

**5. In April, July, October and January of each year, the Attorney General shall be encouraged to obtain subscription listings of consumers in this state who have arranged to be included on any national do-not-call list and add those names to the state do-not-call list.**

**6. No rule or portion of a rule promulgated pursuant to sections 407.1095 to 407.1110 shall take effect unless such rule has been promulgated pursuant to chapter 536, RSMo.**

**407.1104. 1. The "Telemarketing Database Revolving Fund" is hereby created in the state treasury, to be administered and used exclusively by the office of the attorney general pursuant to this section. Moneys deposited in the fund shall be used to**

**promote, develop and maintain a no-call database pursuant to section 407.1101 and to enforce the other provisions of sections 407.1095 to 407.1110.**

**2. Notwithstanding the provisions of section 33.080, RSMo, to the contrary, moneys in the fund shall not be transferred to the credit of the general revenue fund at the end of the biennium.**

**407.1107. 1. Any person or entity who makes a telephone solicitation to the telephone line of any residential subscriber in this state shall, at the beginning of such call, state clearly the identity of the person or entity initiating the call.**

**2. No person or entity who makes a telephone solicitation to the telephone line of a residential subscriber in this state shall knowingly use any method to block or otherwise circumvent such subscriber's use of a caller identification service.**

**3. No telemarketer shall access a consumer's bank account without prior written authorization by the consumer.**

**407.1110. 1. The attorney general may initiate proceedings relating to a knowing violation or threatened knowing violation of section 407.1098 or 407.1107. Such proceedings may include, without limitation, an injunction, a civil penalty up to a maximum of five thousand dollars for each knowing violation and additional relief in any court of competent jurisdiction. The attorney general may issue investigative demands, issue subpoenas, administer oaths, and conduct hearings in the course of investigating a violation of section 407.1098 or 407.1107.**

**2. In addition to the penalties provided in subsection 1 of this section, any person or entity that violates section 407.1107 shall be subject to all penalties, remedies and procedures provided in sections 407.010 to 407.130. The remedies available in this section are cumulative and in addition to any other remedies available by law.**

**3. Any person who has received more than one telephone solicitation within any twelve-month period by or on behalf of the same person or entity in violation of section 407.1098 or 407.1107 may either:**

- (1) Bring an action to enjoin such violation;**
- (2) Bring an action to recover for actual monetary loss from such knowing violation or to receive up to five thousand dollars in damages for each such knowing violation, whichever is greater; or**
- (3) Bring both such actions.**

**4. It shall be a defense in any action or proceeding brought pursuant to this section that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of section 407.1098 or 407.1107.**

**5. No action or proceeding may be brought pursuant to this section:**

**(1) More than two years after the person bringing the action knew or should have known of the occurrence of the alleged violation; or**

**(2) More than two years after the termination of any proceeding or action arising out of the same violation or violations by the state of Missouri, whichever is later.**

**6. A court of this state may exercise personal jurisdiction over any nonresident or his or her executor or administrator as to an action or proceeding authorized by this section in the manner otherwise provided by law.**

**7. The remedies, duties, prohibitions, and penalties of sections 407.1095 to 407.1107 are not exclusive and are in addition to all other causes of action, remedies, and penalties provided by law.**

**8. No provider of telephone caller identification service shall be held liable for violations of section 407.1098 or 407.1107 committed by other persons or entities.**

**407.1113. The attorney general shall establish an advisory group composed of government entities, local telecommunications companies, businesses, and senior citizen and other community advocates to compile and promote a list of educational literature to help consumers understand their options with regard to telephone solicitations. The attorney general shall work with local exchange telecommunications companies to disseminate to their residential subscribers information about the availability of and instructions about how to request educational literature from the attorney general. The attorney general may enter into agreements with those companies for the purpose of dissemination of the educational literature. The attorney general may also establish an Internet website that informs residential subscribers of their rights to be placed on a no call list and the various methods, including notice to the attorney general, of placing their names on this no call list. The attorney general shall have this literature developed for dissemination to the public no later than January 1, 2001.**

**Section 1. When any entity is paid for soliciting contributions via telephone calls, and the pay is based on contributions received as a result of the phone call, the entity making the calls must disclose immediately to all called parties the net percentage of contributions that go to the organization for which the contribution is solicited.**

Section B. The provisions of sections 407.1095 to 407.1110 shall take effect on July 1, 2001.